

**Letter of Findings: 02-20100467
Indiana Corporate Income Tax
For the Tax Years 2006-2008**

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ISSUE

I. Corporate Income Tax—Net Operating Losses.

Authority: IC § 6-3-2-2.6 (as amended effective 2004); IC § 6-3-2-12; IC § 6-8.1-5-1; Kraft General Foods, Inc. v. Iowa Dep't of Revenue and Finance, 505 U.S. 71 (1992).

Taxpayer protests that the Department erred in calculating its available net operating loss deductions.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation that is doing business in Indiana and other states. Taxpayer filed its 2007 and 2008 Indiana corporate income tax returns reporting Indiana net operating loss deductions from net operating losses carried forward from the 2001, 2002, 2003, 2005, and 2006 tax years. Pursuant to an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed adjusted gross income tax for the 2006, 2007, and 2008 tax years. The Department determined that, due to an adjustment from the Internal Revenue Service, the 2006 tax year did not result in a loss. The Department also determined that Taxpayer had incorrectly computed that it had available net operating loss deductions for the 2006, 2007, and 2008 tax years. Taxpayer protested the recalculation of the available net operating loss deductions for the 2006, 2007, and 2008 tax years. An administrative hearing was held, and this Letter of Findings results. Further facts will be supplied as required.

I. Corporate Income Tax—Net Operating Losses.

DISCUSSION

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

The Department determined that Taxpayer had incorrectly computed its available net operating loss deductions for the 2006, 2007, and 2008 tax years.

IC § 6-3-2-2.6(c)-(d) provides the calculation of a corporation's Indiana net operating loss, as follows:

(c) An Indiana net operating loss equals the taxpayer's federal net operating loss for a taxable year as calculated under Section 172 of the Internal Revenue Code, derived from sources within Indiana and adjusted for the modifications required by [IC 6-3-1-3.5](#).

(d) The following provisions apply for purposes of subsection (c):

(1) The modifications that are to be applied are those modifications required under [IC 6-3-1-3.5](#) for the same taxable year in which each net operating loss was incurred.

(2) The amount of the taxpayer's net operating loss that is derived from sources within Indiana shall be determined in the same manner that the amount of the taxpayer's adjusted income derived from sources within Indiana is determined under section 2 of this chapter for the same taxable year during which each loss was incurred.

(3) An Indiana net operating loss includes a net operating loss that arises when the modifications required by [IC 6-3-1-3.5](#) exceed the taxpayer's federal taxable income (as defined in Section 63 of the Internal Revenue Code), if the taxpayer is a corporation, or when the modifications required by [IC 6-3-1-3.5](#) exceed the taxpayer's federal adjusted gross income (as defined by Section 62 of the Internal Revenue Code), if the taxpayer is a nonresident person, for the taxable year in which the Indiana net operating loss is determined.

A. Available Net Operating Losses originating from the Tax Year 2001-2003.

The Department re-calculated the Taxpayer's 2006, 2007, and 2008 net operating loss deductions that originated from net operating losses that were carried forward from the 2001, 2002, and 2003 tax years. Taxpayer asserts the Department actions were incorrect based upon a prior audit, a prior letter of findings, and a prior settlement agreement. After reviewing these documents, the Department is in agreement that the Department's actions were incorrect.

Therefore, Taxpayer's protest to the imposition of tax resulting from the re-calculations of its 2006, 2007, and 2008 net operating loss deductions that originated from net operating losses that were carried forward from the 2001, 2002, and 2003 tax years is sustained.

B. Available Net Operating Loss originating from the Tax Year 2005.

Taxpayer asserts that it also figured its net operating loss deduction originating from the 2005 tax year correctly when it included the deduction found in IC § 6-3-2-12 in the computation. Taxpayer maintains that the deduction found in IC § 6-3-2-12 is "broadly worded" and "stands upon its own" in a way that requires its inclusion

in net operating loss deduction.

IC § 6-3-2-12(b), provides:

A corporation that includes any foreign source dividend in its adjusted gross income for a taxable year is entitled to a deduction from that adjusted gross income. The amount of the deduction equals the product of:

(1) the amount of the foreign source dividend included in the corporation's adjusted gross income for the taxable year; multiplied by

(2) the percentage prescribed in subsection (c), (d), or (e), as the case may be.

Accordingly, IC § 6-3-2-12 allows a taxpayer to take a deduction from its Indiana adjusted gross income for certain foreign source dividend income that has been included in that taxpayer's Indiana adjusted gross income.

The foreign dividend deduction is a specific deduction from Indiana adjusted gross income. However, there is no similar statutory provision for such a deduction in the computation of an Indiana net operating loss deduction. As provided above, the Indiana net operating loss deduction begins with federal adjusted gross income and is modified according to the Indiana statute. The foreign source dividend deduction is not one of the modifications allowed by IC § 6-3-2-2.6 in arriving at the Indiana net operating loss deduction. Therefore, Taxpayer's inclusion of the foreign source dividend deduction in the computation of its net operating loss deduction is contrary to IC § 6-3-2-2.6.

Taxpayer further asserts that the Department, by not including the foreign dividends deduction in the net operating loss deduction calculation, is taxing foreign source dividends. However, the Department is not taxing the foreign dividends. The foreign dividend deduction is a deduction from Indiana adjusted gross income that is allowed to a Taxpayer when appropriate. In this case, the Department has simply properly calculated a new deduction allowed to the Taxpayer under IC § 6-3-2-2.6. Taxpayer's approach would result in compounding the deductions upon one another. Taxpayer has not referenced any statute or regulation which requires the Department, or allows the Taxpayer, to do so. Taxpayer, therefore, invites the Department to exceed the statutory authority IC § 6-3-2-2.6.

Additionally, Taxpayer maintains that IC § 6-3-2-2.6 discriminates against foreign commerce in violation of the United States Constitution. Taxpayer cites to *Kraft General Foods, Inc. v. Iowa Dep't of Revenue and Finance*, 505 U.S. 71 (1992) to support its assertion. However, the instant case is distinguishable from the Kraft case. Unlike the Iowa statutes in Kraft that did not provide for a foreign source dividends deduction, Indiana statutes have a deduction for foreign source dividends. Moreover, in Kraft the Court recognized this distinction among states and that "Iowa could enjoy substantially the same administrative benefits by utilizing the federal definition of taxable income, while making adjustments that avoid the discriminatory treatment of foreign subsidiary dividends. Many other states have adopted this approach." *Id.* at 81 & n.24. In fact, Indiana was included in the list of fifteen states that have taken this approach. See *Id.* 81, n. 24 (referencing the appendix to Kraft's petition for writ of certiorari that contains the list of fifteen states). Thus, the analysis in Kraft actually supports the Department's assessment. Notwithstanding, an administrative hearing conducted by the Department of Revenue is not the proper forum to determine the constitutionality of an Indiana statute.

Therefore, Taxpayer's protest to the imposition of tax resulting from the re-calculations of its 2006 tax year net operating loss deduction that originated from a net operating loss that was carried forward from the 2005 tax years is denied.

FINDING

Taxpayer's protest is sustained in part and denied in part. Taxpayer's protest to the imposition of tax resulting from the re-calculations of its 2006, 2007, and 2008 net operating loss deductions that originated from net operating losses that were carried forward from the 2001, 2002, and 2003 tax years is sustained, as discussed in subpart A. However, Taxpayer's protest to the imposition of tax resulting from the re-calculation of the available net operating loss deduction that originated from a net operating loss that was carried forward from the 2005 tax years is denied, as discussed in subpart B.

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